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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. _____

JAMES ROBERT GROGAN, III, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on November 28, 1967.

CITATIONS TO OPINIONS BELOW

The original opinion of the Court of Appeals, printed in Appendix B hereto, is reported in 386 F.2d 300 (5th Cir. 1967). The opinion of the Court of Appeals on Motion for Reconsideration of Order Denying Original Petition for Rehearing is yet unreported and is printed in Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1967 (R. 890) and rehearing was denied on

December 28, 1967 (S. R. 6). Motion for Leave to File Second Petition for Rehearing was filed January 4, 1968, and considering it as a Motion for Reconsideration of Original Order Denying Rehearing, was granted on February 6, 1968 (S. R. 7). Reconsideration was denied on April 2, 1968 (S. R. 94). Application for Extension of Time in Which to File Petition for Writ of Certiorari was granted April 19, 1968, extending the time to June 1, 1968 (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether an accused can by silence waive his Constitutional protection against being twice placed in jeopardy.

2. Whether jeopardy attaches and bars a subsequent retrial when a trial judge, after a long and complicated trial, declares a mistrial on the ground that the jury cannot agree, but the jury have deliberated only three hours and thirty-five minutes and have never indicated that they are having difficulty agreeing, and the trial judge makes no inquiry of them concerning the status of their deliberations or the probability of agreement.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Constitutional provision involved is the double jeopardy clause of the Fifth Amendment to the Constitution of the United States printed in Appendix E. The Rule involved is R. 12(b) of the Federal Rules of Criminal Procedure, printed in Appendix E.

STATEMENT

On February 2, 1966, petitioner James Robert Grogan, III, together with two other defendants were indicted in two counts for violations of 18 U.S.C. 371 (conspiracy to steal government property) and 18 U.S.C. 641 (receiving stolen government property knowing it to have been stolen) (R. 2-4). Petitioner pled not guilty and was brought to trial on March 28, 1966, before the Honorable J. Robert Elliott, United States District Judge for the Middle District of Georgia, sitting with a jury. The trial of the three defendants, each charged in two counts, consumed four trial days consisting of 21-1/3 actual trial hours. The jury, which heard twenty-three witnesses and had before it over 100 exhibits, retired to deliberate upon its verdict at 5:15 P.M., Thursday, March 31 (R. 851). They deliberated for approximately one hour and fifteen minutes before recessing for supper, returning some hour and a half later. At 10 o'clock P.M., after only 3½ hours of actual deliberations and without any request for additional instructions from the jury, the trial judge recalled them and charged them as follows:

> "Mr. Hudson [foreman of jury], I gather that the jury has not yet been able to reach a verdict in this case . . . . .I presume that it is a question of fact that is bothering the jury . . . .
>
> "Now, you just be seated for a moment and let me give the jury a little further instruction, which may be or may not be of some help to you in the situation. * * * Since it is obvious that you have not reached a verdict with respect to all counts in the indictment with respect to all defendants, but since it is possible that you may have reached unanimous agreement with regard to both counts in connection with some defendant, some one or more defendants, I want to make it clear to you that at any time you reach unanimous

agreement on a verdict with regard to any defendant in this case, you may enter that verdict with regard to that defendant on the indictment and return that verdict into court, even though you may still be in disagreement with regard to the other defendants in the case.

"If you do that . . . then I will decide after you return that verdict what should be done, whether I should require you to deliberate further with regard to the defendant or defendants concerning whom you have not reached agreement, or whether I would simply declare a mistrial with regard to that defendant or those defendants concerning whom you have not reached unanimous agreement." (R. 851-4).

The jury retired and returned in less than ten minutes with a verdict of "not guilty" as to defendant Packard (an employee of petitioner). Without any comment on the part of the jurors or inquiry of them concerning the status of their deliberations as to the remaining defendants, the trial judge declared a mistrial in the following words:

"All right, the Court will declare a mistrial in connection with the cases of Grogan and Davis and the cases will be tried again at a subsequent date before another jury." (R. 857).

On September 6, 1966, petitioner was retried upon the same indictment before Judge Elliott sitting with a jury (R. 24-30). On September 12, 1966, he was found guilty on both counts (R. 799) and sentenced to two terms of five years each, to run concurrently (R. 798-800). On appeal, petitioner contended that jeopardy had attached when Judge Elliott discharged the jury in his first trial. The Court of Appeals for the Fifth Circuit, upon the authority of Federal Rules of Criminal Procedure 12 (b), *Barker v. Ohio*, 328 F.2d

582 (6th Cir. 1964), and *Ferina v. United States*, 340 F.2d 837 (8th Cir. 1965), held that "this defense . . . should have been affirmatively raised at some point in the proceedings in the district court and was thus waived by [petitioner's] failure to assert it at the trial." 386 F.2d at 301. Despite this holding, the Court also expressed its opinion as to the merits of petitioner's plea of former jeopardy, and, citing *United States v. Perez*, 9 Wheat. (22 US) 578, (1824), said in dictum that the trial court "did not abuse its discretion by declaring a mistrial . . . ." 386 F.2d at 302.

After petition for rehearing was denied, petitioner's trial counsel withdrew from the case (his principal counsel had died while the appeal was being prepared) and petitioner retained present counsel, who sought reconsideration of the Court's original opinion on appeal on the grounds that the Court had not previously had the benefit of numerous controlling decisions, including this Court's opinion in *Downum v. United States*, 372 U.S. 734 (1963). The Motion for Leave to File Petition for Reconsideration was granted and petitioner filed briefs in support of his contention that jeopardy attached when the jury was discharged under circumstances which made the mistrial not merely an abuse of discretion but a total failure to exercise discretion. The Court of Appeals disregarded petitioner's substantive arguments and, in a *per curiam* opinion filed April 2, 1968, (Appendix C) reaffirmed its original holding on waiver by silence and added:

> "The trial judge . . . saw quite clearly that the jury was unable to agree on a verdict."

Petitioner contends that, on the contrary, the trial judge made no effort to determine the status of the jury's deliberations and that no facts existed on which to base his conclusion that "the jury was unable to agree."

REASONS THE WRIT SHOULD BE GRANTED

1. The decisions of the court below in the instant case and of the Eighth Circuit in *Ferina v. United States*, 340 F.2d 837 (1965) and the Sixth Circuit in *Barker v. Ohio*, 328 F.2d 582 (1964), upon the authority of which the instant case was decided, directly conflict with the decision of the Ninth Circuit in *Himmelfarb v. United States*, 175 F.2d 924 (1949).

In *Himmelfarb*, the District Attorney made an improper reference to another case pending against the defendant, and Himmelfarb's attorney moved for a mistrial, which was granted. Himmelfarb was retried and convicted and, on appeal, raised the issue of former jeopardy on the grounds that the discharge of the first jury had been improper, even though it had been at the instance of Himmelfarb's attorney. The government contended that the attorney's motion constituted an express waiver of Himmelfarb's right to assert double jeopardy. The Ninth Circuit cited this Court's decision on waiver of Constitutional rights in *Glasser v. United States*, 315 U.S. 60, 67 (1941) and held that "no stipulation of counsel waiving his client's constitutional right could be effective without the client's specific assent." Even an attorney's motion for a mistrial cannot justify an otherwise improper discharge of a jury, because such a holding would be "to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused." In the instant case, there was not even a motion for a mistrial, and the Fifth Circuit relies upon the failure of petitioner's trial counsel to object specifically to the mistrial and to raise this point expressly at the beginning of the second trial, citing as authority, in the latter instance, Federal Rules of Criminal Procedure 12(b). The Sixth and Eighth Circuit opinions cite no superior authority nor reasoning and rely solely upon Rule 12(b).

Rule 12(b), however, is not appropriate here, because the improper declaration of a mistrial operates as an acquittal, *Downum v. United States*, 372 U.S. 734 (1963), which divests the court of further jurisdiction; and that rule contains a specific exception for "defenses . . . based on defects [which] . . . show [a lack of] . . . jurisdiction in the court . . . ." These, the Rule commands, "*shall* be noticed by the court at any time . . . ." (Emphasis added.) Proceedings subsequent to an acquittal by reason of the attachment of jeopardy are *coram non judice* just as much as if the court had sought to impose a second penalty, *Ex parte Lange*, 85 U.S. 163 (1874), or if the defendant had been deprived of his right to counsel, *Johnson v. Zerbst*, 304 U.S. 458 (1938). It is difficult to imagine circumstances in which an accused would knowingly and intelligently waive an improperly declared mistrial since this would be tantamount to his discharge.

The doctrine of waiver by silence with reference to this particular constitutional right has recently been twice rejected by this Court. In *Green v. United States*, 355 U.S. 184 (1957), the government contended that the defendant's appeal of his conviction on the ground that it was not supported by the evidence, waived his right to assert former jeopardy with regard to a higher offense on which the jury had returned no verdict at the first trial. This court rejected the implied waiver theory, holding that

> "in any normal sense, . . . [waiver] connotes some kind of voluntary knowing relinquishment of a right." *Id.* at 191.

Again, in *Gori v. United States*, the defendant failed to raise his double jeopardy objection in the trial court and the Second Circuit's holding was based upon waiver by silence, 282 F.2d 43, 47 (1960). This Court, however, did not even feel the point worthy of consideration in its opinion, deciding the case on its merits, 367 U.S. 364 (1961).

These decisions are in accord with this Court's holdings regarding waiver of other fundamental rights. *Miranda v. Arizona*, 384 U.S. 436 (1966), *Johnson v. Zerbst*, 304 U.S. 458 (1938), *Gideon v. Wainwright*, 372 U.S. 335 (1963); see also *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966), R. 19. The Circuit Courts which rely upon the doctrine of waiver by silence demonstrate their uncertainty as to its validity when, after their holdings, they uniformly consider the cases on their merits. As *Himmelfarb* holds, the protection against double jeopardy is so fundamental that no action on the part of counsel can operate to deprive an accused of his right to be informed of his basic constitutional guarantees and to make for himself the decision to waive his immunity from further prosecution. How can a Constitutional right be said to exist, much less be meaningful, if the accused, without knowledge of its existence or without understanding that the facts unfolding before him trigger its application, loses the benefit of it by his silence?

2. Following as it did upon a holding of waiver by silence of a basic Constitutional right (and jurisdictional requisite), the cursory consideration given by the Fifth Circuit to the merits of the petitioner's plea resulted in serious error. As early as 1824, this Court dealt with the effect of the declaration of a mistrial because of the jury's inability to agree, *United States v. Perez*, 9 Wheat. (22 U.S.) 578. Perez had been indicted for piracy and, after a short trial, the case was submitted to the jury. Some time later, they reported to the trial court that they were unable to agree and that there was no probability that further deliberation would lead to unanimity. As a consequence, the trial judge decided to discharge them. When Perez later claimed immunity from further prosecution on Constitutional grounds, Circuit Justice Van Ness, on the strength of the English practice, favored sustaining the plea, regardless of the circumstances under which

the mistrial had been declared. Mr. Justice Thompson, however, thought there was no merit in Perez's contention because in his view "the Court had power to discharge the jury in criminal cases . . . in the sound discretion of the court, under all the circumstances of the case." 37 Fed Cas. at 505.

The case came to the Supreme Court by certification because of this division of opinion among the Circuit Justices. The question was again whether there could be any circumstances in which a discharge of the jury would not work an acquittal. Mr. Justice Storey held that Federal courts could declare mistrials but that the power was a very limited one: only in the exercise of a "sound discretion . . . used with the greatest caution, under urgent circumstances, and for very plain and obvious causes," 9 Wheat. (22 U.S.) 578 (1824). And this Court recently reaffirmed this exacting standard in *Downum v. United States*, 372 U.S. 734, 735-6 (1963), holding that "the discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances . . . .'"

Petitioner contends that, far from meeting the commands of *Perez* and *Downum* for a sound discretion in ordering a mistrial, the trial judge in the instant case exercised no discretion at all. The important facts are that petitioner's trial was long and complicated—three defendants, six counts, four trial days, twenty-three witnesses, over 100 exhibits. The jury deliberated only three and one-half hours and *never* indicated in any manner that they were having difficulty reaching agreement. On these totally neutral facts, Judge Elliott recalled the jury and instructed them that they could return a piecemeal verdict. The instruction appears as an attempt to ease the jury's deliberations on difficult matters by allowing

them to clear away the counts upon which they were agreed.[1] They immediately acquitted petitioner's employee. Immediately upon the announcement by the jury of their decision as to one of the defendants, the judge summarily discharged the jury, without permitting them to retire and deliberate on the remaining defendants.

A statement by the jury that they were deadlocked on the remaining defendants, or, lacking a spontaneous declaration, an inquiry by the trial judge concerning the status of their deliberations or even how they stood on their last ballot might have justified a mistrial. But the jury made no such declaration and Judge Elliott made no inquiry, as the meticulous record demonstrates. Instead he precipitously declared a mistrial as to petitioner and the other remaining defendant. Whether the trial court's action resulted from a misconception of his power or from an intimation that the jury, having acquitted the employee, were about to acquit the employer, the mistrial at that point was patently improper.

In contrast to these facts, this Court has never approved the declaration of a mistrial on the grounds that the jury could not agree unless at least two factors were present: (1) extreme length of jury deliberation, and (2) either a voluntary declaration by the jury that they were deadlocked or an inquiry of them by the trial judge producing a statement to that effect. For example, in *Logan v. United States*, 144 U.S. 263, 298 (1892), the jury were out "forty hours [and] . . . announced in open court they were unable to agree." Simi-

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[1] Judge Elliott frequently used this charge for such a purpose. Counsel's investigation of cases resulting in mistrials in his Divisions of the Middle District, see pp. 13-14, *infra*, disclosed its use in six out of fifteen of them. His practice was to allow the jury to return a verdict on some defendants on some counts and then to retire to deliberate further on remaining counts and defendants. See *United States v. DuPoint*, Thomasville Crim. No. 1170.

larly, in *Dreyer v. Illinois*, 187 U. S. 71 (1902), the jury were out seventeen and one-half hours and reported their inability to agree. *Id.*, 58 NE at 621. Again in *Keerl v. Montana*, 213 U.S. 135 (1908), "the jury were kept out at least twenty-four hours and probably more . . ." *Id.* at 138. And, even more importantly, as the record below showed:

> "The jury . . . returned into Court and *having been inquired of by the judge* . . . it satisfactorily appearing to the Court that the jury cannot agree [the] Court ordered the jury discharged . . . and the clerk . . . to enter of record that the Court found that there was a reasonable probability that the jury would not agree . . ." *Id.*, 85 Pac. at 863 (Emphasis added).

There being no spontaneous declaration from the jury, no inquiry of them by the judge, and no extreme length of deliberation from which an inference could have been drawn that the jury were deadlocked, the only other extant fact was the acquittal of petitioner's employee. If the employee had been convicted, the government might possibly argue that the mistrial was declared for petitioner's benefit and, as such, unexceptionable. *Gori v. United States*, 367 U.S. 364, 369 (1961). But if any inference is possible from the acquittal, it is that they would have acquitted him also.[2]

Thus, Judge Elliott's action is supported neither by judicial findings of fact duly placed upon the record nor by facts *de hors* the court's finding. No authority exists which

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[2] Kalven and Zeisel, *The American Jury*, Little, Brown & Co. (Boston, 1966), pp. 313-17. The authors' University of Chicago Jury Project research indicates that, because of a jury's desire to treat multiple defendants evenhandedly ("the preferential treatment theme"), once one defendant has been acquitted there is a strong likelihood the jury will acquit the remainder. And this tendency exists even when, in contrast to the instant case, the verdict on the second defendant does not depend upon the same facts and circumstances relevant to the first defendant who was acquitted.

justifies a trial judge's conclusions, albeit in good faith, which are supported neither by findings placed upon the record nor by facts *de hors* a finding.[3]

3. These questions of unjustified declarations of mistrials and the resulting possibility of the defendant's uninformed waiver of his Constitutional rights arise surprisingly frequently and, as a consequence, are of substantial importance in the administration of criminal justice. More than 5% of all jury trials end in a dismissal on the ground that the jury are unable to agree.[4] The reasons for this phenomenon are complex and beyond the present question, but the University of Chicago Jury Project has demonstrated that a major indicium of deadlock is the length of the jury's deliberation, particularly with regard to the length of the trial. Using the authors' classification (four trial hours equal one trial day), petitioner's first trial falls into the category of "over one week" in length. The Jury Project discovered that the average jury in this category required 7.3 *hours to reach agreement, and a full 10 hours to reach deadlock.* Looking at the statistics from another viewpoint, in 87% of the cases in this category the jury deliberated over 5 hours, and in 57%, over 10 hours.[5] The authors' conclusion is that "there is a certain [minimum] time limit which the judge will observe before he *accepts* the

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[3] *Gori v. United States*, 367 U.S. 364, 371, n. 3 (1961) (Douglas, J., dissenting).

[4] Kalven and Zeisel, p. 453, Appendix A, note 3 and tables 140, 142.

[5] As revealed in an examination of court records, in Judge Elliott's own experience, the average time (per trial day) which was required to reach deadlock, was 3.8 hours. By this determination, the jury in the instant case would have had to deliberate 19 hours. In addition, all but one of the cases upon which this computation is based were one day or less, and the Jury Project research indicates that deliberation time increases geometrially with the length of the trial.

jury as deadlocked."[6] The reason undoubtedly lies in the enormous cost of a jury trial extending over such a period of time. The public has a substantial interest in the prevention of mistrials declared after inadequate (or nonexistent) assurance that the jury is in fact hung.[7]

Even more important, from the individual defendant's point of view, a retrial means further

> "embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-8 (1957).

The double jeopardy provision of the Constitution is concerned with the disparity of power and resources between the government and the accused, which disparity becomes increasingly more important if the defendant must undergo another trial.[8]

This ordeal of retrial is amply demonstrated by actual experience in the United States District Court for the Middle District of Georgia. Counsel for petitioner have extensively examined records of cases tried in that court in the Albany, Americus, Columbus and Thomasville divisions, which are

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[6] Kalven and Zeisel, p. 457. (Emphasis added.)

[7] For example, in *United States v. Mason*, Columbus Crim. No. 5228, defendant was accused of purloining less than $80 in building materials. It was only after two successive mistrials that the case against him was dismissed on motion of the District Attorney.

[8] The immense cost of premature termination of a first trial is amply demonstrated in the present case. In his first trial, petitioner expended $10,284.73; his second trial cost $11,254.67. Virtually any defendant's financial resources would have been exhausted after the first trial. This immense cost should weigh heavily in any consideration of circumstances in which a mistrial fairly may be declared.

assigned to Judge Elliott. In these Divisions during the period 1962 - 1967, at least fifteen criminal cases ended in mistrials on the ground that the jury could not agree. In these cases, four defendants were found guilty upon subsequent retrial.[9] In two other cases the defendants pled guilty after mistrials rather than submit to the ordeal and expense of a second trial.[10] In three cases retrial again resulted in hung juries, in two of these cases the indictment was then dismissed,[11] but in the third the defendant pled guilty after two mistrials.[12] A jury deadlock might ordinarily be said to offer some hope to a defendant, since it indicates, at the least, that some jurors have a reasonable doubt as to his guilt, but the experience in the Middle District of Georgia indicates that this hope is outweighed by the advantage to the prosecutor in having two, or potentially three, bites at the apple. While the double jeopardy clause may not prevent retrial after a trial in which error has been committed, it should stand as a guarantee to the defendant that, absent extraordinary circumstances, he will not again have to marshall his resources after the jury has received his case free from error. Petitioner does not urge upon this Court any extraordinary rule of law. He merely asks that this Court firmly delineate the circumstances in which the exercise of a sound discretion in declaring a mistrial is appropriate, and replace the anxiety, expense, hardship, and potential unfairness to which he and other defendants have been put, with, at the very least, a simple

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9/ *United States v. Hamsley*, Americus Crim. No. 1497; *United States v. Lucas*, Columbus Crim. No. 5052 (both defendants); *United States v. Ellis*, Albany Crim. No. 2179.

10/ *United States v. Anderson*, Albany Crim. No. 2222 (two defendants); *United States v. DuPoint*, Thomasville Crim. No. 1002 (defendant Neal).

11/ *United States v. Mason*, Columbus Crim. No. 5228; *United States v. Musselwhite*, Albany Crim. No. 3018.

12/ *United States v. Hightower*, Albany Crim. No. 2246.

requirement that before declaring a mistrial a trial judge should inquire of the jury as to the possibility of their reaching a verdict so as to have a basis upon which to exercise his discretion.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

L. P. McLendon
L. P. McLendon, Jr.
Hubert Humphrey
Charles B. Robson, Jr.
C. Allen Foster
Counsel for petitioner
Post Office Drawer U
Greensboro, N. C.

Of Counsel:
McLendon, Brim, Brooks, Pierce & Daniels

APPENDIX A

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1967

No. 24083

D. C. Docket No. 5148—Criminal Action

JAMES ROBERT GROGAN, III,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before TUTTLE, GEWIN and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

November 28, 1967

Issued as Mandate:

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24083

JAMES ROBERT GROGAN, III,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(November 28, 1967)

Before TUTTLE, GEWIN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge: In this criminal case the principal issue for our determination is whether the trial court erred in twice putting appellant in jeopardy for the same offenses, a mistrial having been declared by the district judge on the first trial when the jury was unable to agree on a verdict as to appellant.

Appellant was the manager of the Shelby Municipal Airport for the City of Shelby, North Carolina. He kept and maintained all types of aircraft for patrons of the airport and was also engaged in the business of building and repairing Bell 47 helicopters. In connection with his business, he

purchased parts from various sources, including Government surplus property sales. In 1964, he made several purchases from one Offutt, a soldier at Fort Benning, Georgia, who appellant alleges represented himself to be a civilian dealer in Government surplus property. An FBI investigation of the above transactions disclosed that Offutt was illegally selling Government property. He was eventually arrested and confessed his part in the illegal transactions. In doing so, he implicated appellant who was then arrested and charged with one count of conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371 and one count of receiving stolen Government property in violation of 18 U.S.C. § 641.

On March 28, 1966, appellant and two other defendants were tried for these offenses before a jury. On the fourth day of the trial, at 5:15 in the afternoon, the jury retired to consider their verdict. After nearly five hours of deliberation, the court had the jury returned to the jury box and instructed them that at any time they reached a unanimous agreement with regard to any of the counts concerning any of the defendants, they could return the verdict they had reached.[1] The jury again retired to the jury room and within five minutes returned a verdict of not guilty on all of the counts against co-defendant Bobby Griffin Packard. Because of the late

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[1]The trial judge said to the jury:

> "Now, since it is obvious that you have not reached a verdict with respect to all counts in the indictment with respect to all defendants, but since it is possible that you may have reached unanimous agreement with regard to both counts in connection with some defendant, some one or more defendants, but have not reached unanimous agreement with regard to all counts with regard to all of the defendants, I want to make it clear to you that at any time you reach unanimous agreement on a verdict with regard to any defendant in this case, you may enter that verdict with regard to that defendant on the indictment and return that verdict into court, even though you may still be in disagreement with regard to the other defendants in the case."

hour and the inability of the jurors to agree on a verdict for the other two defendants, the court immediately declared a mistrial as to those two defendants.

After a second trial on the same indictment, appellant was found guilty and he now claims, for the first time on this appeal, that he was twice put in jeopardy for the same offenses, in violation of the Fifth Amendment to the Constitution of the United States. This defense, properly speaking, should have been affirmatively raised at some point in the proceedings in the district court and was thus waived by appellant's failure to assert it at the trial. See Rule 12(b), Fed. R. Crim. P.; *Barker v. State of Ohio*, 6 Cir., 1964, 328 F. 2d 582; *Ferina v. United States*, 8 Cir., 1965, 340 F. 2d 837.

As to the merits of the plea of former jeopardy itself, we observe that the law is well established, when a jury cannot agree, that the court may in its discretion declare a mistrial without the consent of the opposing parties and without creating a bar to a future trial on the same offense. *The United States v. Perez*, 9 Wheat. 579, 22 U. S. 578, 6 L. Ed. 165 (1824); accord, *Gilmore v. United States*, 5 Cir., 1959, 264 F. 2d 44, cert. denied, 79 S. Ct. 1126; *Rothaus v. United States*, 5 Cir., 1963, 319 F. 2d 528.

Justice Story, delivering the opinion of the Court in the *Perez* case, said:

> "The question, therefore, arises, whether the discharge of the jury by the court from giving any verdict upon the indictment, with which they were charged, without the consent of the prisoner, is a bar to any future trial for the same offense. If it be, then he is entitled to be discharged from custody; if not, then he ought to be held in imprisonment until such trial can be had. We are of the opinion that the facts

> constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think, that in all cases of this nature, the law has invested courts of justice with authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere."

This clear statement of the law has been consistently followed by the federal courts for more than 140 years. *Keerl v. Montana*, 213 U. S. 135, 29 S. Ct. 469, 53 L. Ed. 734 (1909); *Gori v. United States*, 367 U. S. 364, 81 S. Ct. 1523, 6 L. Ed. 2d 901 (1961); *Howard v. United States*, 9 Cir., 1967, 372 F. 2d 294; *Tolan v. United States*, 9 Cir., 1967, 37 F. 2d 799.

The facts in this case do not warrant a deviation from such a well-established standard. The trial judge in his supplemental charge to the jury said that should they return a verdict for less than all of the counts against all of the defendants, he would then decide whether or not to declare a mistrial.[2] With this possibility in mind, after only five minutes

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[2]The district judge's remarks, in pertinent part, are as follows:

> ". . . and if you should return a verdict with regard to some one defendant or some two defendants, without being in complete agreement with regard to the other defendant or defendants remaining, concerning whom you have not reached unanimous agreement, then I will decide after you return that verdict what should be done, whether I should require you to deliberate further with regard to the defendant or defendants concerning whom you have not reached agreement, or whether I would simply declare a mistrial with regard to that defendant or those defendants concerning whom you have not reached unanimous agreement."

of additional deliberation, the jury returned a verdict of acquittal for one defendant and no verdict as to the other two defendants. In view of these circumstances, we find that the court did not abuse its discretion by declaring a mistrial and that a mistrial does not create a bar to a future trial on the same indictment.

In the course of the first trial, appellant introduced into evidence certain documents in support of his defense. After a mistrial was declared at the first trial, he requested the return of his exhibits. Before granting his request, the court allowed the United States Attorney several days in which to examine the records and appellant contends that he was, therefore, forced to give evidence against himself, in violation of the Fifth Amendment. The district judge stated at the start of the second trial that because of the voluminous nature of the records and the fact that they were introduced in the latter stages of the first trial, the United States Attorney should be given an opportunity to examine the records.

The records were voluntarily introduced into evidence by appellant in the first trial and again in the second trial. The law is well settled that once so disclosed, such articles become a matter of public record. *Cf. Schauble v. United States*, 8 Cir., 1930, 40 F. 2d 363. It is a contradiction for appellant, who voluntarily introduced the records in support of his own defense in both trials, to contend that he was required to give evidence against himself because the prosecution was permitted to examine the exhibits he introduced. In *Ballard v. United States*, 9 Cir., 1943, 138 F. 2d 540, the Ninth Circuit in deciding a similar case said:

> "The letters were voluntarily produced and put in evidence by appellants. There was no compulsion, no search or seizure, no violation of the Constitution."

After a reasonable time had been allowed the United

States Attorney, the court ordered the records returned to the respective parties. At the second trial it was appellant who again voluntarily introduced the records into evidence.[3] We find no merit in his contention that he was thus forced to give evidence against himself, in violation of the Fifth Amendment.

Appellant also objected to the admission of the testimony of the witness, Mrs. Offutt, concerning telephone conversations she allegedly had with appellant concerning numerous details of the conspiracy. The controlling decisions on this point hold that such testimony is admissible. "Identification of the voice, however, is not a prerequisite to the admissibility of a telephone conversation. * * * Identity of the person with whom the conversation is alleged to have been had may be established by circumstantial evidence." *Cwach v. United States*, 8 Cir., 1954, 212 F. 2d 520, 525; accord, *United States v. Johnston*, 6 Cir., 1963, 318 F. 2d 288. In the present case there was sufficient circumstantial evidence identifying

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[3]On cross-examination at the second trial appellant testified:

"Q. Well, you didn't object to the District Attorney looking at them; there's nothing that you wanted to conceal from the District Attorney, was there?

"A. No, sir, they've been here in the courtroom; they've been on your desk for the whole world to see as far as I'm concerned.

"Q. Well, the reason I'm asking you about this matter, is you made some point of it that the Government had the records for 30 days; I wanted to know if you had any objections, anything that you didn't want the District Attorney to see in these records?

"A. I sure didn't. Those records, any and every one of them, have been offered to the FBI, the Court or anyone else since May of 1964, anything there.

"Q. You're not making the allegation that the District Attorney or anyone else destroyed any of your records, are you?

"A. No, sir, I haven't made any allegations like that.

"Q. None of your records are missing, are they, sir?

"A. None whatsoever."

appellant as the person the witness spoke with, and, therefore, the district court did not err in admitting her testimony concerning their telephone conversations.

On voir dire examination of the jury for the second trial, the court informed the prospective jurors that a previous trial had ended in a mistrial and inquired of them if they had any knowledge of the proceedings at that trial. Appellant claims that the court, in effect, told the second jury that some members of the first jury believed appellant to be guilty. The court has a broad discretion as to the questions to be asked on voir dire. *Bellard v. United States*, 5 Cir., 1966, 356 F. 2d 437. The information sought by the judge was relevant to the qualification of the jurors and, therefore, we find no abuse of discretion by the district court.

Appellant asserts several other grounds of error (some relating to the court's instructions to the jury) which have been fully considered and are insubstantial and without merit. The court's charge was a fair and correct statement of the applicable law and was conducive to a just determination of the issues by the jury.

AFFIRMED.

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24083

JAMES ROBERT GROGAN, III,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(April 2, 1968)

ON MOTION FOR RECONSIDERATION OF OUR ORDER DENYING ORIGINAL PETITION FOR REHEARING

Before TUTTLE, GEWIN and AINSWORTH, Circuit Judges.

PER CURIAM: In our view, the district court exercised sound discretion in declaring a mistrial as to appellant and another defendant at the first trial of this case. The trial judge, who was present and able to evaluate the situation, saw quite clearly that the jury was unable to agree on a verdict, and we will not interfere with the exercise of judgment on his part which we believe was proper under the circumstances.

Nothing submitted in the exhaustive briefs of new counsel for appellant, in connection with the present motion (including the citation of *Downum v. United States*, 372 U. S. 734, 83 S. Ct. 1033 (1963), which is inapposite because the facts differ radically from those here), causes us to change our original opinion that the circumstances attendant to the declaration of a mistrial in the first trial did not bar a future trial on the same indictment because of asserted double jeopardy.

In the present motion counsel for appellant has injected for the first time in the case the principles of *Miranda v. State of Arizona*, 384 U. S. 436, 86 S. Ct. 1602 (1966). (The present trial in this case occurred after *Miranda*.) *Miranda* is sought to be made applicable here in connection with statements given by the defendant to an FBI agent in that appellant should have been informed additionally that he had the right to the presence of an attorney, either retained or appointed, during the questioning. But *Miranda* is inapplicable because appellant was not in custody or deprived of his freedom in any significant way. The first contact with FBI Agent Scott occurred by telephone on May 13, 1964, and was initiated by appellant. No incriminating information was supplied or requested, Agent Scott informing appellant that he was making a routine investigation. Later, on February 11 and 12, 1965, appellant gave Agent Scott oral statements relative to his acquaintance with Sergeant Offutt and with the purchase of some helicopter blades. Appellant also signed a written statement prepared by Agent Scott dated February 12, 1965, which set forth his business relationship with Offutt. We have carefully examined the written statement of appellant as well as his direct testimony given at the trial of the case and find that they are substantially the same as to the facts and circumstances of the meeting with Offutt and the transactions which appellant had with him. Nowhere in these statements did appellant incriminate himself. He was warned by the agent in advance that he did not have to

make a statement, that any statement he made could be used against him in a court of law, and that he was entitled to consult an attorney before giving any statement at all. There was no compulsive or coercive atmosphere existent during the taking of such statements. No objection was made to the use of the statements, oral or written, by appellant's counsel at the trial. Of course, appellant's version of the facts as reflected in his oral and written statements differs substantially from the testimony of Sergeant Offutt who was a principal prosecution witness against him at the trial. Offutt, who had entered a plea of guilty and was then serving his sentence, testified in considerable detail to the theft (with appellant's knowledge) from the United States Army and delivery to appellant of Army helicopter parts and supplies of a value (civilian price) in excess of a half million dollars, for which Offutt was paid at least fifty thousand dollars by appellant. Undoubtedly this was seriously damaging evidence to appellant's defense.

It is difficult to see how appellant was prejudiced by the statements (consistent with his defense) made to the FBI agent, which appellant corroborated on direct examination when he took the stand in his own defense and, among other things, testified that what was contained in the written statement "is essentially correct."

Reconsideration of our order denying the original petition for rehearing is DENIED.

APPENDIX D

Supreme Court of the United States.

No. 24083

October Term, 1967

JAMES ROBERT GROGAN, III,

Petitioner,

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 1, 1968.

/s/ Hugo L. Black
Associate Justice of the Supreme Court of the United States

Dated this 19th
day of April, 1968.

APPENDIX E

Constitution of the United States of America
Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Criminal Procedure
Rule 12(b)

(b) *The Motion Raising Defenses and Objections.*

(1) *Defenses and Objections Which May Be Raised.* Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

(5) *Effect of Determination.* If a motion is determined adversely to the defendant he shall be permitted to plead if he had not previously pleaded. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any act of Congress relating to periods of limitations.

SUPREME COURT, U. S.

JUL 1 1968

JOHN F. DAVIS, CLERK

No. 142

In the Supreme Court of the United States

OCTOBER TERM, 1968

JAMES ROBERT GROGAN III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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JAMES ROBERT GROGAN III, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. B-1—B-7) is reported at 386 F.2d 300. The opinion of the court of appeals on the motion for reconsideration of the order denying the petition for rehearing (Pet. C-1—C-3) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1967. A petition for rehearing was

denied on December 28, 1967. Thereafter, the court of appeals granted leave to file a motion for reconsideration of the denial of rehearing and on April 2, 1968 denied reconsideration. On April 19, 1968, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to June 1, 1968, and the petition was filed on May 31, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court was justified in finding at petitioner's first trial that the jury was unable to agree upon a verdict, and therefore in declaring a mistrial.

STATEMENT

Petitioner was convicted in the United States District Court for the Middle District of Georgia of receiving stolen helicopter blades belonging to the United States, in violation of 18 U.S.C. 641, and, together with James Davis of a conspiracy to violate this statute. He was sentenced to concurrent terms of imprisonment for five years. The court of appeals affirmed.

1. In 1964, James Offutt, a soldier who issued, and kept records of, aircraft parts at Fort Benning, Georgia (R. 172), sold helicopter parts belonging to the Army to petitioner, the manager of the Shelby, North Carolina municipal airport. Other soldiers including co-defendant Davis and Clifford Holliday assisted Offutt in these transactions (*e.g.*, R. 173, 174, 177, 183-184, 187). Petitioner had made a list of the

parts that he wanted (R. 201, 642, 646-647, 653) and purchased them at 15 percent of their regular price (R. 200).

Between January 1964 and October 1964, Offutt made seven separate transfers of helicopter parts to petitioner (R. 178, 186-187, 200, 210, 213, 217-219, 222-223). In one of these transactions, Offutt and Davis transferred helicopter blades from a military truck to a civilian truck driven by Bobby Packard, an employee of petitioner (R. 200-208, 222).[1] Petitioner than resold these blades to the owner of an Arizona helicopter business (R. 61-65). Petitioner paid for the parts by Western Union money orders payable to Offutt, Offutt's wife, Davis and Holliday (*e.g.*, R. 194-196, 159-162) and also paid Offutt in cash (*e.g.*, R. 208). Petitioner paid Offutt a total of more than $50,000 (R. 225).

Testifying in his own defense, petitioner admitted buying the parts but claimed that Offutt represented himself as a buyer of surplus parts (R. 474 *ff.*).

2. Petitioner was initially tried with Davis and Bobby Packard in a trial which began on March 28, 1966. The jury began its deliberations on March 31, 1966 at 5:15 p.m. At 10:00 p.m., the jury returned to the jury box. The judge, after stating that "I gather that the jury has not yet been able to reach a verdict in this case," cautioned the foreman not to reveal how the jury stood numerically. The court instructed the jury that each defendant was entitled to separate

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[1] On another occasion, Packard also picked up an engine from Offutt (R. 222-223).

consideration, and that it could return different verdicts for the different defendants and different verdicts for each defendant on the separate counts (R. 851-852). The court charged (R. 832):

> * * * I want to make it clear to you that at any time you reach unanimous agreement in a verdict with regard to any defendant in this case, you may enter that verdict with regard to that defendant on the indictment and return that verdict into court, even though you may still be in disagreement with regard to the other defendants in the case.
>
> If you do that, if that is the situation and if you should return a verdict with regard to some one defendant or some two defendants, without being in complete agreement with regard to the other defendant or defendants remaining, concerning whom you have not reached unanimous agreement, then I will decide after you return that verdict what should be done, whether I should require you to deliberate further with regard to the defendant or defendants concerning whom you have not reached agreement, or whether I would simply declare a mistrial with regard to that defendant or those defendants concerning whom you have not reached unanimous agreement.

The court concluded by reiterating that the jury was "at liberty to return" the verdict whenever it reached unanimous agreement and that if it did so the court would decide what would be "the best thing to do concerning the features with respect to which you have not reached unanimous agreement." The court then told the jury to "deliberate further to see if you are able to reach agreement" (R. 854).

The defendants excepted to these additional instructions on the ground that they were a "dynamite charge of the most explosive type" which indicated "to the jury that they should compromise the fate of these men and perhaps trade it out for one guilty count." Counsel for petitioner emphasized that the late hour and the long day made the charge harmful to the defendants (R. 854-856).

Ten minutes later, the jury returned a verdict of not guilty on all of the counts against co-defendant Packard (R. 854-857). The court then declared a mistrial as to petitioner and Davis (R. 857), finding that the jury was unable to agree upon a verdict (R. 15).

Petitioner and Davis were tried a second time on the same indictment. No claim of double jeopardy was made at trial, but on appeal petitioner contended that the first jury had been prematurely discharged and that the second trial subjected him to double jeopardy. The court of appeals held that the trial judge did not abuse his discretion in declaring a mistrial at the first trial (Pet. App. B-5, C-1-2).

ARGUMENT

The holding of the court of appeals that the judge at the first trial was justified in concluding that the jury was unable to agree and therefore in declaring a mistrial, is correct, and does not warrant further review. As this Court said in *Gori* v. *United States*, 367 U.S. 364, 368: "Where, for reasons deemed compelling by the trial judge, who is best situated intel-

ligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." A trial judge has broad discretion to determine whether the circumstances make it appropriate thus to terminate a trial, and the record shows that the judge here properly declared a mistrial.

When the judge did so at 10:20 p.m., the jury had been deliberating, except during whatever dinner recess it had and the court's supplemental charge, since 5:15 p.m. Although the trial had taken four days, the jury was required to resolve only a single narrow question in determining petitioner's guilt or innocence —whether petitioner knew that the aircraft parts he had purchased were stolen. The jury quickly brought in a verdict of acquittal of a co-defendant after the judge in his supplemental charge had instructed it "to see if you are able to reach agreement." Petitioner had challenged the supplemental instructions as a "dynamite charge of the most explosive type," and undoubtedly would have objected even more strongly if the court had given the so-called "Allen charge" (see *Thaggard* v. *United States*, 354 F. 2d 735 (C.A. 5)).

In all the circumstances, the judge was justified in concluding that further deliberation by the jury would be unlikely to produce agreement. He was not required, as petitioner urges (Pet. 10), to question the jury as to the likelihood of their agreeing; he properly inferred the lack of such likelihood from all the cir-

cumstances, and was not required to confirm his conclusion through a specific inquiry.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

JULY 1968.

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[2] Since the trial court properly declared a mistrial, it is unnecessary to consider whether petitioner may properly raise the issue in view of his failure to file a pretrial motion to dismiss the indictment on the ground of double jeopardy or to raise the issue at trial.

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No. 142

United States Court of Appeals

October Term, 1968

JAMES ROBERT GROGAN, III, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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1. The Solicitor General's brief for the United States in opposition to the grant of a Writ of Certiorari demonstrates the impossibility of finding any basis for a proper exercise of discretion by this trial judge in declaring a mistrial. In a seven-page brief, the Solicitor General devotes three and one-half pages to a statement of facts, most of which is taken from a transcript of the Petitioner's *second* trial, and relevant only to the question of Petitioner's guilt

or innocence. Even after this particularization of the record, the Solicitor General is reduced to the assertion that the declaration of a mistrial by the trial judge was justified "in all the circumstances."

If "all the circumstances" in this case are a sufficient basis upon which the discretion to declare a mistrial can be exercised, we can imagine no circumstances in which that discretion could be abused. If the argument of the Solicitor General is accepted and the decision of the court below affirmed, judicial discretion becomes not "a sound discretion used with the greatest caution" but an arbitrary and potentially capricious weapon of judicial power. Its potential is demonstrated by the record guilty pleas obtained after mistrial declared by this trial judge (Pet. 13-14).

A Petition and a Brief in Opposition are improper occasions for detailed consideration of the merits of Petitioner's plea. But, because the brief for the United States relies entirely upon these circumstances, it is necessary to reiterate them briefly. The only extant facts upon which the trial judge could have based his discretion were (1) the length of time the jury had been out and (2) the jury's acquittal of Packard. As to the former, the Solicitor General seeks to reduce a complicated trial to a simple issue of "whether petitioner knew that the aircraft parts he had purchased were stolen." In a similar vein, the only issue in a first degree murder trial is whether the defendant killed the victim with malice aforethought. In the light of the number of defendants, the length of the trial, and the number of witnesses and exhibits bearing only circumstantially upon this complex issue, deliberations of only three and one-half hours cannot serve as a factual base for a trial judge's *otherwise unsupported* conclusion. Similarly, whether the trial judge feared that the jury, having exonerated Packard, would then probably acquit Grogan, or whether he assumed with

no support in fact that the jury could not agree, the mistrial at that point was improper. If any inference is proper, it is that, given time, the jury would have acquitted petitioner, too.

The Solicitor General interjects counsel's objection to the supplemental charge as a fact upon which the trial judge could have relied. First, it does not bear upon the jury's ability to agree. More important, if the Solicitor General is correct, counsel could object to a trial judge's charge only at the price of sacrificing a defendant's valued right not to be twice placed in jeopardy. The United States cannot so burden the exercise of a Constitutional right. *Griffin v. California,* 380 U.S. 609 (1965).

2. The Solicitor General argues, in a footnote, that it is unnecessary to deal with the first question presented by the Petitioner as to whether an accused can by silence waive his Constitutional protection against being twice placed in jeopardy. The Solicitor General's position is that, if the mistrial were properly granted, this serious Constitutional question need not be considered by the Court in this case. Thus, the Solicitor General, just as did the Fifth Circuit below, the Eighth Circuit in *Ferina v. United States,* 340 F.2d 837 (1965) and the Sixth Circuit in *Barker v. Ohio,* 328 F.2d 582 (1964), avoids the Constitutional question by dealing with the merits. The court should take this opportunity to put an end to this approach which, in effect, preordains a decision adverse to the petitioner.

The waiver question is properly and appropriately presented here and should not be avoided. The unequal treatment of defendants, depending on whether they are tried in a Circuit which does or does not condone waiver by silence, should be ended. When the merits of petitioner's claim to this Constitutional guarantee are considered, that considera-

tion should be made in a context free of confusion concerning waiver by silence.

Respectfully submitted,
L. P. McLendon
L. P. McLendon, Jr.
Hubert Humphrey
Charles B. Robson, Jr.
C. Allen Foster

Counsel for petitioner
Post Office Drawer U
Greensboro, N. C.

Of Counsel:
McLendon, Brim, Brooks, Pierce & Daniels